



[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE-2013-BT-PET-0043]

Energy Conservation Program for Consumer Products: Landmark Legal Foundation; Petition for Reconsideration

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Petition for reconsideration; Notice of denial.

SUMMARY: This document announces the Department of Energy's (DOE) denial of a petition from the Landmark Legal Foundation (LLF) requesting reconsideration of DOE's final rule of energy conservation standards for standby mode and off mode for microwave ovens. DOE published the LLF petition and a request for comments in the Federal Register on August 16, 2013. Based upon its evaluation of the petition and careful consideration of the public comments, DOE has decided to deny this petition for rulemaking.

DATES: This denial was issued on December 24, 2013.

ADDRESSES: *Docket:* For access to the docket to read the petition or comments received thereon, go to the Federal eRulemaking Portal at <http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-PET-0043>. In addition, electronic copies of the Petition are available online at DOE's web site at <http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-PET-0043>. For access to the docket for DOE's energy conservation standards for microwave ovens, go to the Federal eRulemaking Portal at https://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/48.

FOR FURTHER INFORMATION CONTACT: John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE-5B, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Telephone: (202) 287-1692. E-mail: John.Cymbalsky@ee.doe.gov.

Ami Grace-Tardy, U.S. Department of Energy, Office of the General Counsel, GC-71, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: (202) 586-5709. E-mail: Ami.Grace-Tardy@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Background
- II. The SCC Analysis Did Not Change the Final Standard as Proposed or Adopted
- III. The Final Rule Was the Logical Outgrowth of the Proposed Rule
- IV. Comments on Sufficiency of the Science and Precedential Effects
- V. Conclusion

I. Background

The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., provides, among other things, that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” (5 U.S.C. 553(e).) DOE received a petition from the Landmark Legal Foundation (LLF) on July 2, 2013, requesting that DOE reconsider its final rule of Energy Conservation Standards for Standby Mode and Off Mode for Microwave Ovens, Docket No. EERE-2011-BT-STD-0048, RIN 1904-AC07, 78 FR 36316 (June 17, 2013) (“final rule”).

The final rule was adopted by DOE in accordance with the Energy Policy and Conservation Act of 1975 (EPCA; 42 U.S.C. 6291 et seq.). See 78 FR 36316. Under EPCA, any new or amended energy conservation standard shall achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether an amended standard is economically justified, DOE must determine whether the benefits

of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination by considering, to the greatest extent practicable, seven factors set out in EPCA. Id. On June 17, 2013, DOE published a final rule adopting standby mode and off mode standards that DOE determined would result in significant conservation of energy and that were technologically feasible and economically justified. See 78 FR 36316.

The final rule was the result of a rulemaking that began in 2008 and resulted in a decision by DOE to analyze potential energy conservation standards for the active mode of microwave ovens separate from the standby and off modes of microwave ovens. See 73 FR 62034 (October 17, 2008). In April 2009, DOE concluded that it should defer a decision regarding amended energy conservation standards that would address standby and off modes for microwave ovens pending further rulemaking and finalized a “no standard” standard for microwave oven active mode energy use. 74 FR 16040 (April 8, 2009).

DOE issued a Supplemental Notice of Proposed Rulemaking (SNOPR) on February 14, 2012, that proposed energy conservation standards for microwave oven stand by and off modes. 77 FR 8526. In the SNOPR, as part of its economic analysis of the proposed rule, DOE sought to monetize the cost savings associated with the reduced carbon dioxide (CO₂) emissions that would result from the expected energy savings of the proposed rule. To do this, DOE used the most recent values of the Social Cost of

Carbon (SCC) available, which, at the time, was the SCC calculation developed by the “Interagency Working Group on Social Cost of Carbon 2010.”¹ 77 FR 8555.

Monetizing the cost savings associated with the reduced carbon emissions has been routine practice in DOE energy conservation standards rulemakings. The purpose of the SCC estimates presented in the microwave oven rule, and other DOE energy conservation standards rulemakings, was to allow DOE to assess the monetized social benefits of reducing CO₂ emissions as part of the analysis of these regulatory actions that have small, or “marginal,” impacts on cumulative global emissions. In the rulemaking at-hand and many other past rulemakings, DOE has utilized SCC values to calculate whether the economic effect of reduced CO₂ emissions impacts the Department’s regulatory decision. As evidenced by Table I-3 in the final rule, DOE calculates a standard’s SCC values and incorporates those calculations in the analysis for the rulemaking to see whether, and if so how, the weighing of benefits and costs is impacted when the SCC values are also applied to the standard. See 78 FR 36318-19. The SCC values may or may not affect DOE’s decision on a final standard.

DOE includes an analysis with SCC values because under section 1(b)(6) of Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (October 4, 1993), agencies must, to the extent permitted by law, assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are

¹ Available at: <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf>

difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. The Interagency Working Group on Social Cost of Carbon (“Interagency Working Group” or “IWG”) was formed to allow agencies to incorporate the monetized social benefits of reducing CO₂ emissions into cost-benefit analyses of regulatory actions that have small, or “marginal,” impacts on cumulative global emissions (such as the rule at-hand). DOE has incorporated SCC values into its rulemakings since the first microwave oven notice of proposed rulemaking (NOPR) in 2008.

As described in the SNOPI, the 2010 SCC values were developed through an interagency process in accordance with Executive Order 12866. In the 2012 SNOPI, DOE stated that the IWG planned to update the 2010 SCC as DOE’s understanding of climate change and its impacts on society improves over time, specifically noting that the interagency group had set a preliminary goal of revisiting the SCC values within two years or at such time as substantially updated models become available. 77 FR 8553-54.

In May 2013, subsequent to the SNOPI but prior to DOE’s issuance of the final rule, the IWG released revised SCC values. (“Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866,” Interagency Working Group on Social Cost of Carbon, United States Government, 2013²) As these

² Available at:
http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf

were “the most recent (2013) SCC values from the interagency group,” DOE included both these revised SCC values and the 2010 SCC values in the final rule. 78 FR 36318.

On November 1, 2013, the Office of Information and Regulatory Affairs at the Office of Management and Budget (OMB) announced minor technical corrections to the 2013 SCC values, which result in a central estimated value of the Social Cost of Carbon in 2015 of \$37 per metric ton of CO₂, instead of the \$38 per metric ton of CO₂ estimate released in May 2013.³ This change is based on two corrections made to the runs based on the FUND model.⁴ OMB also announced a new opportunity for public comment on the revised TSD underlying the SCC estimates in addition to the public comment opportunities already available through particular rulemakings. In a November 26, 2013 notice, OMB described the changes detailed above and announced a 60-day public comment period on all aspects of the revised TSD. 78 FR 70586.

DOE adjusted Table 1-3 as displayed in the final rule to account for these minor technical corrections to the 2013 SCC values. As evidenced by the information displayed Table 1 below, the corrections to the 2013 SCC values, when evaluated as part of the analysis, did not significantly alter the net benefits of the final rule.

³ See <http://www.whitehouse.gov/blog/2013/11/01/refining-estimates-social-cost-carbon>

⁴ See Appendix B, available at: <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/technical-update-social-cost-of-carbon-for-regulator-impact-analysis.pdf>

Table 1. Summary of National Economic Benefits and Costs of Microwave Oven Standby Power Energy Conservation Standards

Category	Present Value (Million 2011\$)	Discount Rate
Benefits		
Operating Cost Savings	2,306	7%
	4,717	3%
<u>Using November 2013 Social Cost of Carbon Values</u>		
CO ₂ Reduction Monetized Value (\$12.6/t case)*	254	5%
CO ₂ Reduction Monetized Value (\$40.0/t case)*	1,166	3%
CO ₂ Reduction Monetized Value (\$62.2/t case)*	1,853	2.5%
CO ₂ Reduction Monetized Value (\$118/t case)*	3,599	3%
NO _x Reduction Monetized Value (at \$2,567/ton)*	21.8	7%
	44.5	3%
Total Benefits†	3,493	7%
	5,927	3%
<u>Using May 2013 Social Cost of Carbon Values</u>		
CO ₂ Reduction Monetized Value (\$12.6/t case)*	255	5%
CO ₂ Reduction Monetized Value (\$41.1/t case)*	1,179	3%
CO ₂ Reduction Monetized Value (\$63.2/t case)*	1,876	2.5%
CO ₂ Reduction Monetized Value (\$119/t case)*	3,615	3%
NO _x Reduction Monetized Value (at \$2,567/ton)*	21.8	7%
	44.5	3%
Total Benefits†	3,507	7%
	5,941	3%
Costs		
Incremental Installed Costs	776	7%
	1,341	3%
Net Benefits (using Revised May 2013 SCC values)		
Including CO ₂ and NO _x Reduction Monetized Value	2,717	7%
	4,586	3%
Net Benefits (using November 2013 SCC values)		
Including CO ₂ and NO _x Reduction Monetized Value	2,731	7%
	4,600	3%

* The CO₂ values represent global values of the social cost of CO₂ emissions (in 2011\$) in 2016 under several scenarios. The first three values are averages of SCC distributions calculated using 5%, 3%, and 2.5% discount rates, respectively. The fourth value represents the 95th percentile of the SCC distribution calculated using a 3% discount rate. The value for NO_x is the mid-range value used in DOE's analysis.

† Total Benefits for both the 3% and 7% cases are derived using the series corresponding to SCC value of \$40.0/t or \$41.1/t in 2015 (derived from the 3% discount rate value for SCC).

Before the revisions to the 2013 SCC values were announced in November 2013, on July 2, 2013, LLF petitioned DOE to reconsider the final rule on the grounds that the SCC values were a critical part of the cost-benefit analysis in this rulemaking and that the SCC values changed from the SNOPR phase to the final rule phase of the rulemaking without an opportunity for public comment on those changed values.⁵ See 78 FR 49976-78. LLF's primary contention is that DOE's used the 2013 SCC values in the final rule (as opposed to the 2010 SCC values used in the SNOPR) without sufficient notice and an opportunity for public comment in violation of the APA and Executive Order 13563 (76 FR 3281 (January 21, 2011)). LLF stated that the SCC value change is a fundamental change in a critical component of DOE's analysis, which the Department was required to publish and provide an opportunity for public comment on prior to use in the final rule. See 78 FR 49977. Because the change in SCC values could affect how other agencies use the SCC when calculating the costs and benefits of other rules relating to greenhouse gasses, LLF contends that the change in SCC values is "significant and wide reaching." See id. LLF requested that DOE immediately rescind the final rule and halt implementation of the rule or, in the alternative, publish the changes described in the petition and provide an opportunity for public comment. 78 FR 49978.

As noted above, DOE published a document in the Federal Register on August 16, 2013, containing the petition and requesting public comment. 78 FR 49975. DOE received comments from non-governmental organizations, manufacturers, and utilities.

⁵ LLF's petition and associated comments can be found under Docket No. EERE-BT-PET-0043 found at: <http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-PET-0043>

DOE received comments from the Laclede Gas Company (Laclede), Heritage Foundation (Heritage), Tri-State Generation and Transmission Association, Inc. (Tri-State), Southeastern Legal Foundation, Inc. (Southeastern), Florida Municipal Electric Association (FMEA), Gainesville Regional Utilities (GRU), Science and Environmental Policy Project (SEPP), Competitive Enterprise Institute (CEI), Association of Home Appliance Manufacturers (AHAM), Environmental Defense Fund (EDF), joint comments from the American Chemistry Council, American Petroleum Institute, National Association of Home Builders, Portland Cement Association, American Forest & Paper Association, Council of Industrial Boiler Owners, and National Mining Association (collectively, ACC), National Federation of Independent Businesses (NFIB), the American Petroleum Institute (API), American Fuel and Petrochemicals Manufacturers (AFPM), American Public Gas Association (APGA), Utility Air Regulatory Group (UARG), George Washington University Regulatory Studies Center (GWU-RSC), Right Climate Stuff Research Team (TRCS), Institute for Energy Research (IER), AFFORD Coalition (AFFORD), Industrial Energy Consumers of America (IECA), American Gas Association (AGA), Cato Institute Center for Study of Science (Cato), Consumers Energy (CE), American for Tax Reform (ATR), George Mason University Mercatus Center (George Mason), U.S. Chamber of Commerce (Chamber), National Association of Manufacturers (NAM), joint comments from Appliance Standards Awareness Project, Earthjustice, Natural Resources Defense Council (collectively, ASAP), and several individuals. With the exception of the commenters discussed below, all of the commenters listed above support LLF's petition. Like LLF, they did not find fault with

the standby and off mode energy conservation standards themselves, but rather criticized DOE's use of the SCC values.

Three commenters (Chamber, AHAM, and NAM) support some of the contentions in LLF's petition, but urged DOE not to reconsider the rule. AHAM stated that it opposes LLF's petition because granting it would "seriously disrupt" the certainty regarding microwave oven standby and off mode standards that manufacturers are using for planning and investment. (AHAM, No. 33)⁶ NAM requested that DOE remove the SCC from the microwave rule and finalize the rule to avoid any uncertainty to manufacturers. (NAM, No. 29)

Three other commenters, including one set of joint comments from environmental and energy efficiency advocates, oppose the petition in its entirety and encouraged DOE to not reconsider the rule. (EDF, No. 31; ASAP, No. 32; Adam Christensen (Christensen), No. 14) The following discussion summarizes and responds to comments on the LLF petition, as well as the LLF petition itself.

II. The SCC Analysis Did Not Impact the Standard as Proposed or Adopted

As described above, DOE utilized SCC values – in both the SNOPR and final rule analysis – as a way to assess the economic effects of reduced CO₂ emissions. DOE

⁶ Notations of this form appear throughout this document and identify statements made in written comments that DOE has received and has included in the docket for this petition. For example, "AHAM, No. 33" refers to a comment from AHAM in document 33 in the docket of this rulemaking (available at: <http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-PET-0043>).

calculates a standard's SCC values and incorporates those calculations in the analysis for the rulemaking to see whether, and if so how, the weighing of benefits and costs is impacted when the SCC values are also applied to the standard. The SCC values may or may not affect DOE's decision on a final standard.

In the microwave oven rule, the SCC analysis did not affect DOE's decision regarding the standards that were published in the Federal Register at either the proposed rule or final rule stage because the estimated benefits to consumers of the standard exceeded the costs of the standard, even without considering the SCC values. At the proposed rule stage, without adding any benefits from reducing CO₂, the annualized operating cost savings at the proposed standard level were significantly larger than the annualized incremental product costs. See 77 FR 8528-59. At the final rule stage, rather than change the outcome of DOE's microwave oven standards, the updated May 2013 SCC values served only as an incremental increase in the benefits of the standards that DOE had already proposed adopting. See 78 FR 36318. Specifically, the \$4.2 billion net benefits of the SNO PR increased to \$4.6 billion in the final rule as a result of the change in SCC values to the 2013 updated values. See id. Again, as with the SNO PR, the operating cost savings were significantly larger than the incremental installed costs, even without adding in the economic effect of reduced CO₂ emissions. See 78 FR 36318-20. Given DOE's legal obligation to establish any new or amended energy conservation standard at the point that achieves the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified (42 U.S.C. 6295(o)(3)(A)–(B)), and given that in deciding whether an amended standard is

economically justified, DOE must determine whether the benefits of the standard exceed its burdens, DOE would have chosen the same energy conservation standards at both the proposed rule and final rule stage regardless of its SCC analysis.

Finally, additional notice and comment is required in instances where the new data provided the “most critical factual material that is used to support the agency’s position.” (Chamber of Commerce of U.S., 443 F.3d at 900) UARG did not specifically contend that DOE violated the APA, but did comment that the SCC values are a “critical assumption” for DOE’s economic analysis for the microwave oven rule, stating that Executive Order 12866 requires DOE to provide the public notice and an opportunity to comment on the SCC values at both the proposed and final rule stage because the SCC values were, according to UARG, a critical assumption for DOE’s economic analysis for the final rule. (UARG, No. 28) As described above, the SCC values were not critical to any analysis in DOE’s final rule. Although the SCC values increased in the 2013 update, this input did not influence DOE’s decision regarding the final energy conservation standard chosen. DOE proposed the same standard in the SNOPR as it finalized in the final rule.⁷

Because DOE adopted the same standard in the final rule that it had proposed in the SNOPR, LLF has not demonstrated that the Department would – or even might – have changed the standard adopted in the final rule if LLF (and others) had been given an opportunity to comment on the 2013 SCC values. To the contrary, even if comments had

⁷ There is no dispute that DOE accepted public comment on the 2008 proposed rule and 2012 SNOPR.

convinced DOE not to update the SCC values, given that DOE adopted the same standard it had proposed based on the 2010 SCC values DOE would have chosen the same standards as it did in the final rule. Moreover, as described previously, the other benefits of the rule so outweighed its costs that DOE's choice of a proposed standard was not influenced by the SCC analysis. Even when the SCC values increased, DOE's choice of a final standard was not influenced by the SCC analysis. As demonstrated in the table above, this remains the case even applying the modifications released by OMB on November 1. Therefore, any reconsideration of the microwave oven rule would be an inefficient use of government resources and would not inform further the choice of final standard to be adopted.

III. The Final Rule Was the Logical Outgrowth of the Proposed Rule

In response to the notice of LLF's petition, many commenters agreed with LLF that because the final rule applied the 2013 SCC values whereas the SNOPR applied the 2010 SCC values and there was not an opportunity for the public to comment on the change to the SCC values between the SNOPR and final rule stages, the notice and comment requirements under the APA were violated. (Laclede, No.7; Tri-State, No. 18; Southeastern, No. 17; GRU, No. 21; CEI, No. 34; AHAM, No. 33; NFIB, No. 6; API, No. 30; NAM, No. 29; George Mason, No. 11; AFPM, No. 16; APGA, No. 13; GWU-RSC, No. 5; Chamber, No. 23; TRCS, No. 25; IER, No. 9; AFFORD, No. 20; IECA, No. 22; AGA, No. 10; Cato, No. 8; CE, No. 15; ATR, No. 12; ACC, No. 29; FMEA, No. 19; Heritage, No. 26) A few commenters contended that the notice provided by the entirety of DOE's rulemaking easily provided sufficient notice and comment regarding the SCC

values and the final rule (and associated SCC values) were the logical outgrowth of the SNOPR. (ASAP, No. 32; EDF, No. 31; Christensen, No. 14)⁸

The APA requires Federal agencies to give interested persons an opportunity to participate in a rulemaking through submission of written data, views or arguments, after the Federal agency gives proper notice. (5 U.S.C. 553(c)) As described, DOE has provided the public with notice and the opportunity to comment throughout this rulemaking, including the opportunity to comment on DOE's use of the SCC values. In the SNOPR, DOE sought to monetize the cost savings associated with the reduced carbon emissions that would result from the energy conservation standards, if adopted. DOE included in the SNOPR Technical Support Document (TSD) a robust description of the data source, the peer-reviewed economic models (the FUND, DICE, and PAGE models) and the methodology used to derive the SCC.⁹ Further, DOE explicitly stated in the SNOPR, SNOPR TSD, final rule, and final rule TSD that, while the methodology used to derive the SCC would not change, the SCC values used in the rulemaking were undergoing review and were subject to change based on updated inputs to the models. In

⁸ Because DOE concludes in this notice to deny the petition, DOE does not here detail the legal arguments put forth by these organizations as to why DOE should deny the petition. It should be noted, however, that DOE bases its decision to deny the petition on some of the legal bases included in these comments, but does not address each legal basis discussed by commenters in this notice.

⁹ The SCC was also discussed in the 2008 NOPR (proposing the development of separate standards for microwave ovens in active, standby and off modes) and the 2009 final rule (finalizing a "no standard" standard for microwave ovens in active mode and deferring the rulemaking for standby and off modes for microwave ovens). A different model and different SCC values were utilized for the 2008 and 2009 rules than the models and SCC values used for the 2012 SNOPR and 2013 final rule. For the 2008 and 2009 rules, DOE used the most current SCC values then available: those based on the estimates identified by the study cited in "Summary for Policymakers," prepared by Working Group II of the IPCC's "Fourth Assessment Report," to estimate the potential monetary value of CO₂ reductions likely to result from standards considered in the rulemaking, assigned a SCC value range of \$0 to \$20 (2007\$) per ton of CO₂ emissions in both rulemakings. See 74 FR 16079 (April 8, 2009); 73 FR 62120 (October 17, 2008).

the SNO PR, DOE stated that the 2010 SCC estimates were presented and utilized in DOE’s analyses with an acknowledgement that many uncertainties are involved and with a clear understanding that the estimates should be updated over time to reflect increased knowledge of the science and economics of climate change. 77 FR 8553. At the time of the SNO PR’s publication, the 2010 SCC values were used because they were, at the time, the most recent interagency estimates. *Id.* DOE cautioned, however, that the interagency process planned to update these estimates as the science and economic understanding of climate change and its impact on society improved over time, noting that the interagency group had set a preliminary goal of revisiting the SCC values within two years or at such time as substantially updated models become available. *Id.* at 8554. DOE stated that current SCC estimates should be treated as “provisional and revisable” because the values will evolve with improved scientific and economic understanding. *Id.* at 8555. These statements were reiterated in chapter 16 of the TSD that supported the SNO PR.¹⁰ The SNO PR TSD included the 2010 IWG’s TSD.

In the interim between the SNO PR and the final rule, in May 2013, the IWG released revised SCC values that estimated higher values for CO₂ emissions avoided than the 2010 SCC values.¹¹ According to OMB, since the release of the SCC values in February 2010, numerous rulemakings have used the 2010 values for the SCC and many of those rulemakings received extensive public comments, including comments on the

¹⁰ See TSD, Chapter 16 and Appendix 16A, available at: <http://www.regulations.gov/#!documentDetail;D=EERE-2011-BT-STD-0048-0002>

¹¹ Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf

discount rate chosen and the three peer-reviewed models used to develop the SCC estimates.¹² Since the 2010 SCC values were published, the three models (the FUND, DICE, and PAGE models) that underpin the SCC estimates were all updated and used in peer-reviewed literature.¹³ The changes made in May 2013 to the SCC estimates reflect the refinements to the underlying models, not to the methodology followed or to any Federal government inputs, such as discount rates, population growth, climate sensitivity distribution, and socio-economic trajectories.¹⁴

Consistent with its statement in the SNO PR that it would use the most recent SCC values, DOE utilized the 2013 SCC values in the June 2013 final rule. Again, DOE stated that the SCC estimates are provisional and would be updated over time to reflect increasing knowledge of the science and economics of climate impacts. 78 FR 36349-51. In the final rule, DOE described the updates to the three integrated assessment models that are used to estimate the SCC (FUND, DICE, and PAGE models). 78 FR 36349. The final rule TSD includes as appendices both the 2010 and 2013 interagency TSDs upon which the SCC values are based.¹⁵

The regulatory history cited above also refutes any contention that – the 2013 SCC values were not a “logical outgrowth” of the proposed rule – and therefore that the use of the 2013 SCC values violates the notice and opportunity to comment provisions of

¹² See Testimony of Howard Shelanski, available at: <http://oversight.house.gov/wp-content/uploads/2013/07/Shelanski-OIRA-Testimony-SCC-7-18.pdf> (July 18, 2013).

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See Appendix 16A and Appendix 16B, available at: <http://www.regulations.gov/#!documentDetail;D=EERE-2011-BT-STD-0048-0021>

the APA. A final rule satisfies the “logical outgrowth” test if parties should have anticipated that the change at issue was possible and, thus, reasonably should have filed their comments during the comment period. (Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936, 952 (D.C. Cir. 2004) (citing City of Waukesha v. EPA, 320 F.3d 228, 245 (D.C. Cir. 2003)) An agency that adopts a final rule that differs from its proposed rules is required to provide notice and an additional opportunity for public comment when the changes are so major that the original notice did not adequately frame the subjects for discussion. The purpose of the new notice is to allow interested parties a fair opportunity to comment upon the final rules in their altered form. The agency need not renote changes that follow logically from, or that reasonably develop, the rule the agency proposed originally. (Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n, 673 F.2d 525, 533 (D.C. Cir. 1982) (citations omitted))

With regard to DOE’s calculation of the monetized benefits associated with the reduced carbon emissions, DOE gave notice to interested parties both in the SNO PR and the TSD to the SNO PR that the agency was considering SCC values in its decision-making and that those SCC values were subject to change based on scientific and economic understanding of climate change and were expected to be updated approximately every two years.

Moreover, DOE relied on SCC values that were generated from the same models (i.e., the FUND, DICE, and PAGE models) for both the SNO PR and final rule. In Solite Corporation v. EPA, the D.C. Circuit held that an agency is not required to provide

additional notice and opportunity for comment when its “methodology remain[s] constant” and new data is used to “check or confirm prior assessments.” (952 F.2d 473, 485 (D.C. Cir. 1991); see also Chamber of Commerce of U.S. v. S.E.C., 443 F.3d 890, 900 (D.C. Cir. 2006)) Where, as here, an agency is continuing to use the same methodologies (i.e., the FUND, DICE, and PAGE models) but is updating the data used in those models, additional notice and comment is not required.

LLF also contends that DOE disregarded its obligation to have a transparent, public rulemaking as required under Executive Order 13563. Several commenters agreed with LLF that DOE’s change in SCC values was not transparent; some of these commenters argued that this apparent lack of transparency is a violation of Executive Order 13563 (see e.g., Southeastern, No. 17) whereas others pointed to the need for transparency in general as a means to good governance (see e.g., Chamber, No. 23). IER commented that the SCC process is a “black box” and because intermediate results from the modeling runs are not available, it is not possible for outside analysts to check the robustness of the IWG’s conclusions. (IER, No. 9) Some entities commented that they would have raised a number of concerns regarding the basic assumptions and methodology made by the IWG with regard to the 2010 SCC values if notice and an opportunity for comment had been provided at that time. (FMEA, No. 19; GRU, No. 21) (See also Laclede, No. 7; Heritage, No. 26; NFIB, No. 6; API, No. 30; NAM, No. 29; APGA, No. 13; GWU-RSC, No. 5; TRCS, No. 25; IER, No. 9; IECA, No. 22; AGA, No. 10; Cato, No. 8; CEI, No. 34; ATR, No. 12; Todd Kiefer (Kiefer), No. 4)

As evidenced by the regulatory history described previously, the rulemaking at hand provided the public a 60-day comment period during which comments were made through a variety of means and the materials related to the rulemaking were kept on the microwave oven docket on the regulations.gov website at <http://www.regulations.gov/#!docketDetail;D=EERE-2011-BT-STD-0048>. As detailed at the same website, a public meeting was held on the SNOPR on March 14, 2012. The technical and scientific findings that DOE relied upon for its SNOPR and final rule were included in the rule itself, as well as the relevant TSDs. DOE's assessment with respect to the SCC was very clearly described in each of those documents. All of these materials were provided in a searchable format on the electronic docket. DOE accepted and responded to public comments on all aspects of this rulemaking.

In response to the notice of LLF's petition, one stakeholder commented on DOE's authority under EPCA to evaluate SCC values when setting energy conservation standards. Laclede commented that section 331 of EPCA, as amended, was intended to constrain cost-benefit analyses to utility costs, not "environmental externalities" such as the SCC. (Laclede, No. 7) As described above, DOE did not consider SCC as a utility cost in the microwave oven rulemaking.

IECA also argued that DOE's use of the SCC makes DOE's rule "significant" under Executive Order 12866 and OMB requirements because DOE intends to use the SCC in multiple rulemakings, which will increase costs to an amount above \$100 million. (IECA, No. 22) DOE notes that the final rule was deemed to be an "economically

significant regulatory action” under section 3(f)(1) of Executive Order 12866.

Accordingly, as required by section 6(a)(3) of the Executive Order, DOE prepared a regulatory impact analysis that OMB reviewed in addition to OMB review of the final rule itself. See 78 FR 36365.

ACC commented that the IWG failed to disclose the effects and uncertainties related to alternative regulatory actions as required by OMB Circular A-4.¹⁶ (ACC, No. 29) Through its extensive analysis of different TSLs, including their effects and uncertainties, DOE met this requirement with regard to the final energy conservation standards as part of its Executive Order 13563 review. See 78 FR 36365.

IV. Comments on Sufficiency of the Science and Precedential Effects

In responding to the August 16, 2013, Federal Register petition document, many commenters questioned the scientific and economic basis of the SCC values. These commenters made extensive comments about: the alleged lack of economic theory underlying the models; the sufficiency of the models for policy-making; potential flaws in the models’ inputs and assumptions (including the discount rates and climate sensitivity chosen); whether there was adequate peer review of the three models; whether there was adequate peer review of the TSD supporting the 2013 SCC values;¹⁷ whether the SCC estimates comply with OMB’s “Final Information Quality Bulletin for Peer

¹⁶ DOE recognizes that ACC and the Chamber both attached to their comments on the petition at-hand a September 4, 2013, petition to OMB for correction to the 2010 and 2013 SCC TSDs. Because those petitions are under consideration at OMB, in this notice, DOE only addresses the comments made in the microwave rule petition.

¹⁷ Available at:

http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf

Review”¹⁸ and DOE’s own guidelines for ensuring and maximizing the quality, objectivity, utility and integrity of information disseminated by DOE; whether DOE’s use of the updated SCC values has precedential effect for other agency rulemakings; and why DOE is considering global benefits of carbon dioxide emission reductions rather than solely domestic benefits. (See CEI, No. 34; Heritage, No. 24; IER, No. 9; Cato, No. 8; AFFORD, No. 20; ATR, No. 12; ACC, No. 29; AFPM, No. 16; FMEA, No. 19; Heritage, No. 26; IECA, No. 22; TRCS, No. 25; SEEP No. 27; Kiefer, No. 4; ACC, No. 29; Chamber, No. 23; Laclede, No. 7; API, No. 30; APGA, No. 13; GWU-RSC, No. 5; AGA, No. 10; GRU, No. 21; NAM, No. 29; George Mason, No. 11)

As described above, OMB has announced minor technical corrections to the 2013 SCC values and a new opportunity for public comment on the revised TSD underlying the SCC estimates. Comments regarding the underlying science and potential precedential effect of the SCC estimates resulting from the interagency process should be directed to that process. See 78 FR 70586. Additionally, as EDF documented in its comments, several current rulemakings also use the 2013 SCC values and the public is welcome to comment on the values as applied in those rulemakings just as the public was welcome to comment on the use and application of the 2010 SCC values in the many rules that were published using those values in the past three years. (EDF, No. at pp. 4-5).

¹⁸ Available at: http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf

Finally, in addition to the topics above, commenters provided feedback on several other issues that go beyond the scope of the notice asking for comments on whether DOE should reconsider the microwave oven rule. IECA commented that the use of SCC values in regulation will negatively impact U.S. manufacturers, shipping U.S. production, jobs and investments overseas, which IECA contends would lead to more CO emissions by non-U.S. energy sources. IECA also questioned why the benefits of U.S. production to U.S. consumers and the economy are not considered by DOE. (IECA, No. 22) Other comments include statements about whether climate change is occurring at all, contentions that climate change may be natural and not human-caused, and that climate change may not have significant, adverse impacts; statements that all fossil-fueled power plants should be replaced with nuclear power plants and DOE should be reorganized to only work on nuclear issues; suggestions to use the IPCC Fifth Assessment Report when considering SCC values; statements that effects due to other greenhouse gases and other harms to society need to be included in the SCC as well; comments that the standards rule (apart from the SCC portion) must be reopened because the regulation fails to pass benefit-cost tests because it assumes irrational consumer behavior; and questions about why comments on the Draft National Climate Assessment were not addressed in DOE's rule.

V. Conclusion

After reviewing LLF's petition and comments on the petition, DOE has concluded that it has provided sufficient notice and the opportunity for public comment as required under the Administrative Procedure Act and a level of transparency in accordance with Executive Order 13563 regarding the use of SCC values in the microwave oven SNOPR and final rule. DOE has also concluded that reconsidering the microwave oven final rule would not result in any change to the standard ultimately adopted by DOE. As a result of the above analysis, and in consideration of LLF's petition and the comments received thereon, DOE denies the petition.

Issued in Washington, DC, on December 24, 2013.

Kathleen B. Hogan
Deputy Assistant Secretary for Energy Efficiency
Energy Efficiency and Renewable Energy

[FR Doc. 2013-31273 Filed 12/30/2013 at 8:45 am; Publication Date: 12/31/2013]